Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VILLA MARINA YACHT SALES, INC., VILLA MARINA YACHT HARBOUR, INC., AND SAN JUAN BAY MARINA, INC.,

Petitioners,

v.

HATTERAS YACHT, HATTERAS INTERNATIONAL, DIVISIONS OF GENMAR INDUSTRIES, INC., GENMAR INDUSTRIES, INC., AND HERBERT L. POCKLINGTON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a federal court can relinquish its virtually unflagging obligation to exercise jurisdiction in favor of an alternate forum which the Court of Appeals has found to be inadequate to protect plaintiff's constitutional rights to a jury, an appeal, and counsel.

(2) Whether a federal court should relinquish its virtually unflagging obligation to exercise jurisdiction in favor of (1) a declaratory judgment which was found to be filed in anticipation of litigation, and (2) when at least four factors have been found to favor the retention of jurisdiction.

(3) Whether the district court deprived plaintiff of due process by making a factual finding against plaintiff directly contrary to the affidavit

submitted by plaintiff, but which was the only evidence submitted on this issue.

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The January 30, 1990 opinion of the United States District Court for the District of Puerto Rico (Gierbolini, J.) dismissing this action under the Colorado River doctrine is unreported and contained in the Appendix to this brief at A-95. The September 20, 1990 opinion of the United States Court of Appeals for the First Circuit vacating that decision and remanding the action for further consideration is reported at 915 F.2d 7 ("Villa Marina I") and is contained in the Appendix at A-55. The district court's March 27, 1991 opinion on remand dismissing the case under Colorado River is reported at 762 F. Supp. 1007 and contained in the Appendix at A-34. The First Circuit's October 22, 1991 opinion affirming the district court's order of dismissal is reported at 947 F.2d 529

("Villa Marina II") and is included in the Appendix at A-1.

JURISDICTION

On October 22, 1991, the United States Court of Appeals for the First Circuit entered judgment affirming the district court's dismissal under the Colorado River doctrine. On December 2, 1991, the First Circuit denied appellants' motion for rehearing and rehearing in banc. Jurisdiction of this Court to review the First Circuit's judgment by writ of certiorari arises under 28 U.S.C. § 1254(1).

STATUTES

The constitutional provisions involved in this petition are the fifth and seventh amendments to the United States Constitution, which respectively provide in relevant part that:

> 1. "No person shall be ... deprived of life, liberty, or

property, without due process of law . . . ."

2. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

STATEMENT OF THE CASE

Plaintiff Villa Marina Yacht Sales, Inc. ("Villa Marina")[1] had been a distributor of Hatteras Yachts since 1980 (Complaint, ¶¶ 6-7, Record ("R.") 6-7). On September 26, 1988, defendant Hatteras International ("Hatteras") terminated plaintiff's distributorship. (Complaint, ¶ 24, R. 13.)

Hatteras filed a declaratory judgment on January 9, 1989 in the Commonwealth court which the district court found was filed in anticipation of this suit by plaintiff. 762 F. Supp. at 1008, App. at A-36. Villa Marina filed a

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[1]There are no parent or subsidiary companies of any of the plaintiff corporations.

counterclaim on February 7, 1989 seeking to be reinstated as the Hatteras distributor (R. 1451) and then filed a separate suit against Hatteras's new distributor, Hatteras Yacht Sales of Puerto Rico (not a party to this action and not related to Hatteras) and Hatteras's president, Herbert Pocklington, on February 10, 1989. 762 F. Supp. at 1008, App. at A-36-37.

Villa Marina filed a motion in the Hatteras action for a preliminary injunction to attend the upcoming Miami boat show as the only authorized Hatteras distributor in Puerto Rico. (R. 1455.) The motion was denied on February 15, 1989. (R. 1457.)

In addition to distributing Hatteras Yachts, Villa Marina had also been the authorized dealer for Bertram Yachts in Puerto Rico since January 1, 1981. (Complaint, ¶¶ 53-54, R. 22.) On

April 11, 1989, Bertram terminated Villa Marina's dealership. (Complaint, ¶¶ 57-59, R. 23.) Subsequently, plaintiff learned that Pocklington and Hatteras precipitated this termination. (Complaint, ¶ 56, R. 23.) As a result, plaintiff filed this action in the district court.[2] While counts I and II related solely to the Hatteras situation, Count III related solely to the Bertram termination which did not occur until April 11, 1989, well after the Commonwealth court denied the requested injunction.

On August 8, 1989, defendant Pocklington filed a motion to dismiss contending that the federal court lacked personal jurisdiction over him. (R. 64.) Thereafter, on November 30, 1989, defendants moved to dismiss under the

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[2]Jurisdiction was invoked on diversity grounds under 28 U.S.C. § 1332.

abstention doctrine set forth in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). (R. 118.) During the pendency of these motions from August 8, 1989 to January 30, 1990 when the district court issued its opinion, 10 motions to prevent plaintiffs' discovery were filed, including "urgent" motions and appeals from unfavorable rulings of the Magistrate. (R. 64, 84, 90, 95, 99, 107, 114, 171, 229, 234.) Indeed, the district court specifically found that defendants stalled the discovery in this case. 762 F. Supp. at 1009, App. at A-42.

In its January 30, 1990 opinion, the district court granted Pocklington's motion to dismiss for lack of personal jurisdiction and granted Hatteras's motion to dismiss under the Colorado River doctrine. (R. 320, App. at A-95.) Plaintiff moved for an expedited appeal which was granted by the First Circuit.

On September 20, 1990, the First Circuit reversed the district court's decision that it did not have jurisdiction over Pocklington and vacated its judgment that the case should be dismissed under Colorado River. Villa Marina I, 915 F.2d 7, App. at A-55. The case was remanded to the district court with a request to articulate "relevant facts that do not appear in the appellate record" to justify the district court's decision to dismiss. 915 F.2d at 13, App. at A-80-81. In point of fact, there were no relevant facts that did not appear in the appellate record as the appellate record and trial court record were one in the same. No hearings or conferences had occurred in the district court.

On remand, defendants filed a motion to confirm dismissal under Colorado River. (R. 343.) Defendants filed a cross motion for an evidentiary hearing.

(R. 582.) The court set a hearing for December 4, 1990. (R. 2.) At the hearing, plaintiff proffered the testimony of plaintiff's president, Eduardo Ferrer, who would testify that this suit was motivated by the Bertram termination that occurred after the injunction hearing in the Commonwealth court and by plaintiff's desire for a forum in which it could have a jury, a right to appeal, and its English-speaking counsel. (12/4/90 Tr. at 21-22.) No counter-offer of proof was made by defendants. The court set a simultaneous briefing schedule and ordered the parties to include anything they wished in their filing. (12/4/90 Tr. at 61.)

On January 4, 1991, plaintiff filed its memorandum pursuant to the court's December 4, 1990 order. (R. 655.) Attached to its memorandum was the affidavit of Eduardo Ferrer, the president

of plaintiff. In his affidavit, Mr. Ferrer stated that he authorized the filing of the federal suit because of the Bertram termination (R. 679, ¶¶ 3-4); he wanted a jury trial (R. 679, ¶ 4); he wanted the procedural safeguard of an automatic appeal which he did not have under Puerto Rican law (R. 679, ¶ 5); and he wanted the same lawyer to handle both the company's separate suit against Bertram and the Hatteras suit. (R. 679, ¶ 4.) Both cases were filed in the federal court on the same day as the instant case by the same lawyer: Michael J. Rovell. As Mr. Rovell does not speak Spanish and Spanish is the official language of the Commonwealth court, for all practical purposes Mr. Rovell would be precluded from handling litigation in that court.

No counter-affidavit was filed. Nor was there a motion to strike or any additional evidence submitted that was not

before the district court when it dismissed the case in January 1990. In addition, the district court found that jurisdiction over the res and convenience of the forum "cut against dismissal." 762 F. Supp. at 1009, App. at A-41-42. Nevertheless, the district court found that plaintiff's suit was a reaction to the denial of the preliminary injunction back in February 1990, and again dismissed the suit. 762 F. Supp at 1010, App. at A-A-47.

The district court relied heavily upon a finding in a different action that that suit was a reaction to this suit. 762 F. Supp. at 1010, App. at A-47-48. The First Circuit did not endorse the concept of "borrowing" the subsequent judge's finding and expressly noted that it would not decide whether this procedure was proper. Villa Marina II, 947 F.2d at 533, App. at A-15.

Moreover, the borrowed finding is the subject of appeal No. 91-1657 that has been scheduled for oral argument on March 4, 1992.

On October 22, 1991, the First Circuit affirmed the dismissal because plaintiff's "arguments fall short of demonstrating an abuse of the court's discretion . . . ." Villa Marina II, 947 F.2d at 531, App. at A-2. Even more telling is the First Circuit's comment: "And, regardless of our own inclinations, we are unable to say that the court abused its discretion . . . ." 947 F.2d at 537, App. at A-33.

In discussing the factors to be considered in a Colorado River analysis, the First Circuit expressly found that the "federal court will be more advantageous for many litigants in Puerto Rico" because of the right to a jury, an appeal as a matter of right and choice of counsel.

The court thus concluded that "the district court erroneously counted the forum adequacy factor in favor of dismissal." Villa Marina II, 947 F.2d at 537, App. at A-31-32.

Moreover, while the First Circuit noted that "[t]he district court determined that the [removal] policy should have some weight and that it operated against Villa Marina's desire to litigate in federal court," it concluded that "removal policy does not operate in favor of dismissal here." Villa Marina II, 947 F.2d at 536, App. at A-26, A-29.

The district court's finding that jurisdiction over the res and convenience of the forum "cut against dismissal," 762 F. Supp. at 1009, App. at A-41-42, plus the First Circuit's determination that removal policy did not favor dismissal and that the alternate forum was inadequate to safeguard

plaintiff's rights made at least four factors found to weigh against dismissal.

ARGUMENT

I. THIS ACTION WAS IMPROPERLY DISMISSED IN FAVOR OF A FORUM THAT DOES NOT ADEQUATELY PROTECT PLAINTIFF'S CONSTITUTIONAL RIGHTS

No reported case has been found where a federal court has declined to exercise its jurisdiction when it found that the favored forum did not adequately safeguard the parties' rights. It is inconceivable that a court in one breath could extol its "virtually unflagging obligation . . . to exercise the jurisdiction given [it]" (quoting Colorado River, 424 U.S. at 817 (1976)); proclaim that "[o]nly the clearest of justifications will warrant dismissal" (quoting Colorado River, 424 U.S. at 819); emphasize that "[t]o ensure that only exceptional cases are dismissed . . . the

district court must approach its decision 'with the balance heavily weighted in favor of the exercise of jurisdiction'" (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 US 1, 16 (1983)); promise that "the district court must look beyond the routine inefficiency that is the inevitable result of parallel proceedings to determine whether there is some exceptional basis for requiring the case to proceed entirely in the Commonwealth court"; pledge that "[d]ismissal is not warranted simply because . . . two courts otherwise would be deciding the same issues"; and then proceed to dismiss the case when the Commonwealth court deprived plaintiff of its right to a jury; a right to an automatic appeal; and a right to have its choice of counsel. See Villa Marina I, 915 F.2d at 12, 16; App. at A-73-74, 77.

Surely, when Congress promulgated the Judiciary Act of 1789 and established diversity jurisdiction, it did not think that the federal courts would decline to exercise the jurisdiction it gave them in favor of a forum that is conducted in a foreign language and where procedures are based upon foreign law quite separate and apart from Anglo-American jurisprudence.

While Congress has occasionally amended the Judiciary Act, it has never seen fit to exclude Puerto Rico from the ambit of diversity jurisdiction. Hence, there is no reason to believe that Congress intended to provide the citizens of Puerto Rico lesser protection and safeguards than other citizens. Nor has this Court ever intimated that its decision should apply in a "watered down" version to Puerto Rico.

The underpinnings of the fundamental rights of trial by jury and right to counsel are so well known to this Court that it would be presumptuous of plaintiff to provide a dissertation on these rights. Nor could plaintiff possibly improve on this Court's own pronouncements concerning these fundamental rights. See, e.g., Dimick v. Schiedt, 293 U.S. 474 (1935) ("[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial shall be scrutinized with the utmost care"); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (the right to counsel, while possibly not a fundamental right nor essential to a fair trial in other countries is fundamental and essential in the United States); Johnson v. Zerbst, 304

U.S. 458, 462 (1938) (the Sixth Amendment right to counsel is an essential right of a litigant and "if the constitutional safeguards it provides be lost, justice will not 'still be done.'"); Powell v. Alabama, 887 U.S. 45, 53, 69 (1932) ("the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice" in both civil and criminal proceedings). See also Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118 (5th Cir.), cert. denied, 449 U.S. 820 (1980) ("the Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of fifth amendment due process").

The First Circuit has specifically held that the constitutional right to a jury applies to citizens of Puerto Rico who sue in the federal court,

notwithstanding that the same citizens do not have a right to a jury in the Commonwealth court. See Marshall v. Perez Arzuaga, 828 F.2d 845, 849 (1st Cir. 1987), cert. denied, 484 U.S. 1065 (1988).

It is anomalous for a court to recognize the right with one hand and permit the taking of the right with the other. By dismissing this action, the lower court has precluded plaintiff from exercising its constitutional rights to a jury and counsel and its fundamental federal right to an automatic appeal.

II. THE COURT OF APPEALS FAILED TO APPLY THE PRONOUNCEMENTS OF THIS COURT IN COLORADO RIVER AND ITS PROGENY

This Court took great pains to emphasize that the exception created by its decision in Colorado River was to be narrowly construed. The Court has characterized the federal court's obligation to exercise its jurisdiction as "virtually unflagging." Colorado River,

424 U.S. at 817. It has also held that the balance is "heavily weighted in favor of jurisdiction." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 16 (1983).

This Court foresaw the possibility that these admonitions would go unheeded and, like here, be given lip service only to be sacrificed upon the altar of the abuse of discretion standard:

> Yet to say that the district court has discretion is not to say that its decision is unreviewable; such discretion must be exercised under the relevant standard prescribed by this Court.

Moses H. Cone Mem. Hosp., 460 U.S. at 19.

Twice the First Circuit intimated that its decision would have differed from the district court's. In Villa Marina I, the court indicated that it could have weighed the factors and decided the case itself, but chose instead to remand in case the district court knew

something the court of appeals did not. Villa Marina I, 915 F.2d at 13, App. at A-80-81 (the "district court may be privy to relevant facts that do not appear in the appellate record"). In fact, in Gonzalez v. Cruz, 926 F.2d 1, 3 (1st Cir. 1991), the First Circuit relied on its opinion in Villa Marina I and expressly stated that it concluded in Villa Marina I "that the factors considered by the district court were insufficient to warrant dismissal . . . ."

In Villa Marina II, the court indicated that the district court's opinion was contrary to the First Circuit's "own inclinations," but affirmed because it was "unable to say that the [district] court abused its discretion . . . ." 947 F.2d at 537, App. at A-33. The fact that the First Circuit in reviewing the record would presumably have reached a different conclusion supports the position

that the case should not have been dismissed.

In addition, this is the only reported case where a declaratory judgment action has been given precedence over an actual claim for damages. In the past, the fact that the action was a declaratory judgment action was used as a basis to surrender, not retain, jurisdiction. See, e.g., Fuller Co. v. Ramon I. Gil, 782 F.2d 306 (1st Cir. 1986) (court found that dismissal of the federal action was proper where it sought declaratory relief); National R.R. Passenger Corp. v. Providence & Worcester R.R. Co., 798 F.2d 8 (1st Cir. 1986) (affirming dismissal of a federal declaratory judgment action where state court had jurisdiction over res); Liberty Mutual Ins. Co. v. Foremost-McKesson, Inc., 751 F.2d 475 (1st Cir. 1985) (federal declaratory judgment action dismissed to avoid piecemeal litigation).

This is the only reported case where it has been found that the alternate forum could not safeguard the litigant's rights and the court nevertheless surrendered jurisdiction.

This is the only reported case where at least four factors have been found to "cut against" dismissal and the case is dismissed even though the balance should be heavily weighted in favor of the retention of jurisdiction which can only be surrendered in the "exceptional" case because of the unflagging obligation of the lower courts to exercise the jurisdiction that Congress has given them.

If the Colorado River doctrine is to have any vitality, this Court must reverse. The First Circuit's opinion has widened the "narrow stream" of Colorado River to the widest expanse of the Pacific Ocean. One cannot intellectually square the results below with the Court's

holdings in Colorado River and its progeny. While plaintiff believes that Colorado River and its progeny were correctly decided, plaintiff respectfully submits that it is better to overrule Colorado River than to engage in the fiction that it is being applied and permit a lower court for any reason to dismiss a case no matter how many factors "cut against dismissal" and no matter how "unexceptional" the case really is.

It is evident that the First Circuit applied a general abuse of discretion standard rather than determining whether the district court abused its discretion in view of the balance heavily weighted in favor of the retention of jurisdiction as set forth by this Court.[3] In essence, the First

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[3]Plaintiffs respectfully submit that even under a lesser standard of abuse of discretion, the First Circuit failed to follow its decision in Coon v. Grenier,

Circuit has permitted the lower court carte blanche in determining whether to retain or surrender jurisdiction as long as the lower court intones the correct words. Surely this Court's admonitions and the spirit of this Court's decisions cannot be so easily circumvented.

In this case, the lower court specifically found that defendants' suit in the alternate forum was filed in anticipation of plaintiffs' claim. 762 F. Supp. at 1008, App. at A-36. Although it found (we believe erroneously) that the

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867 F.2d 73, 78 (1st Cir. 1989), where it stated that "abuse of discretion" occurs when "a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." Here the First Circuit found that two factors the lower court weighed in favor of dismissal ought to have been weighed against dismissal. Villa Marina II, 947 F.2d at 536-37, App. at A-29-30.

alternate forum was more advanced,[4] it found that defendants stalled discovery here. 762 F. Supp. at 1009, App. at A-42. In short, defendant is rewarded for its purposeful delaying tactics.

III. PLAINTIFFS' RIGHT TO DUE PROCESS WAS VIOLATED BY THE TRIAL COURT'S FINDING WITHOUT AN EVIDENTIARY HEARING AND CONTRARY TO PLAINTIFFS' AFFIDAVIT, THAT THIS SUIT WAS REACTIVE

The court of appeals found that the district court "supportably found" that this lawsuit was reactive, a factor properly considered in determining whether to decline the exercise of jurisdiction under Colorado River. Villa Marina II, 947 F.2d at 533; App. at A-15. The district court's finding, however, is contrary to the only evidence submitted on this issue, an affidavit of Villa Marina's

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[4]At the time of the lower court's decision, the Supreme Court of Puerto Rico had stayed proceedings in the Commonwealth court. 762 F. Supp. at 1009, App. at A-43-44.

president, Eduardo Ferrer. By disregarding this affidavit, the court implicitly made a credibility determination without holding an evidentiary hearing and therefore violated Villa Marina's right to due process.

A litigant has a constitutional right to be heard and explain his conduct. Hovey v. Elliot, 167 U.S. 409, 416, 418 (1897). Moreover, a judgment supported by no evidence on an essential element violates due process. Vachon v. New Hampshire, 414 U.S. 478 (1974) (per curiam). Thus, a court may not make findings contrary to unrebutted direct evidence without conducting a hearing to assess the credibility of that evidence.

Ferrer submitted an affidavit explaining that he filed this action because Hatteras's interference with the Bertram contract led to the termination of that contract and substantial damages that

were not the subject of the Commonwealth suit. (R. 679, ¶¶ 3-4.) In addition, Ferrer explained that the suit was filed in federal court because in that court, unlike the Commonwealth court, he had a right to jury, an appeal as of right, and the ability to choose English-speaking counsel. (R. 679, ¶¶ 4-5.)

These statements were unrebutted. No counter-affidavit was filed. No evidence was ever taken. Moreover, the record corroborated Ferrer's statements. The Bertram case, No. 89-0313, was filed in the United States District Court for the District of Puerto Rico on the same day as this case. Both cases demanded trial by jury, and in both cases Villa Marina was represented by the same Chicago attorney. Finally, unlike the Commonwealth action, no equitable relief was sought in this action.

The district court recognized that Ferrer's reasons showed a motivation for filing the federal suit that was neither reactive nor vexatious. 762 F. Supp. at 1010, App. at A-46-47. Nevertheless, the district court concluded that "Villa Marina came to federal court in reaction to its failure to obtain a preliminary injunction in the Superior Court." 762 F. Supp. at 1010, App. at A-47.

The district court's finding is premised solely on the fact that this suit was filed at a point in time after the Commonwealth court denied a motion for preliminary injunction. This does not constitute evidence. See Vachon v. New Hampshire, 414 U.S. 478 (1974) (per curiam) (where state required to prove that defendant store operator personally sold minor an inscribed button pin, testimony that defendant "controlled the

premises" that day not probative as to whether he sold the button).

Ferrer expressly stated that the denial of the injunction had no bearing on his decision to file in federal court. By finding that the denial of the injunction was the motivation for the federal suit, the court made a credibility determination that Ferrer's statements were untrue without ever hearing him. While the court could have found for plaintiff based on his uncontested affidavit, it violated plaintiff's right to be heard by disregarding the affidavit and making a contrary factual determination. Accordingly, plaintiff's right to be heard was violated.

CONCLUSION

For the reasons set forth above, petitioners respectfully request this Court to grant their petition for writ of certiorari.

Respectfully submitted,

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Dated: March 2, 1992